UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MULTICARE HEALTH SYSTEM d/b/a INDIGO URGENT CARE CLINICS, Employer, And UNION OF AMERICAN PHYSICIANS AND DENTISTS, AFFILIATED WITH THE AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 206, AFL-CIO, Petitioner.	CASE NO. 19-RC-221006 **STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE**

I. INTRODUCTION

The Union of American Physicians and Dentists ("Union" or "UAPD") files this brief in opposition to MultiCare Health System's Request for Review of the Regional Director's Supplemental Decision and Certification of Representative. The Board should not grant review because the Regional Director properly concluded that Indigo providers constitute an appropriate unit, that there was no basis to reopen the record for the submission of evidence that could have been presented at the hearing, and that the Union's conduct during bargaining negotiations for the MultiCare Urgent Care system ("MUCC") unit was neither objectionable nor so closely tied to the Indigo unit's election as to influence the vote.

Review is granted only for "compelling reasons." Review may not be granted unless the Regional Director departed from precedent, a factual ruling was clearly erroneous and prejudiced the rights of a party, the conduct of the hearing resulted in prejudicial error, or there are

compelling reasons for reconsideration of an important Board rule or policy. 29 CFR §102.67(d)(1)-(4). There is no compelling reason to grant review in this case. The Regional Director properly applied Board precedent in a thorough and well-reasoned decision. While MultiCare Health System ("MultiCare" or "Employer") may disagree with the Regional Director's application of precedent, there is no basis to grant review in this case.

II. STATEMENT OF FACTS

MultiCare operates six independent networks of urgent care clinics including the MUCC, the Indigo Urgent Care system, the Immediate Clinic ("IC") system, the Rockwood Clinic system, the Mary Bridge Pediatric system, and the Wood Creek Pediatric system. *See* Decision and Direction of Election, 1. The Indigo Urgent Care System opened in 2016. *Id.* Indigo operates 16 urgent care clinics and employs a staff of around 50 providers. *Id.* at 2.

The Regional Director found that providers from the Indigo and IC systems had nearly identical skills, duties, working conditions, and job functions, though providers in the IC system also worked in occupational health and primary care clinics and Indigo providers did not. *Id.* at 2. The contracts, salaries, and shifts for each urgent care system are the same, *id*. at 3, as are policies regarding on-call shifts and float providers, though employees do not float between systems. *Id.* at 4.

The Director also found that each system operates separately, using its own dedicated staff of providers who regularly rotate between their system's clinics to provide coverage. Decision and Direction of Election, 4. Each system has its own providers, as well as distinct uniforms, badges, and branding, *Id.* at 2, its own float pool of providers, and its own on-call groups. *Id.* at 5. In addition, Indigo and IC clinics use separate medical records systems; providers cannot move from one system to the other without training on the particular medical

record system. *Id*. at 2. Each system also has its own website identifying the location of each clinic and the services provided by clinics in the system. *Id.* at 2. Clinics do not share equipment, though they do share a centralized supply ordering system and a single patient scheduling system across all of its urgent care systems. *Id.* Providers occasionally refer patients to other clinics, but only to recommend further care at a particular type of facility or to suggest a patient go to a nearby clinic with a shorter wait time. *Id.*

Regarding future functional integration, MultiCare's Vice President of Retail Health testified the Employer intended to move IC providers to the Indigo unit, potentially by June 2019, and someday hoped to completely unify the two brands. *Id.* at 4. However, the Regional Director found no evidence that there were specific plans for such an overhaul or a set date for that change. *Id*.

Employee interchange among the separate urgent care systems is almost non-existent, *id.* at 4-5; out of a total of over 100 employees working in the Indigo system and the Immediate Clinic system, only four had worked outside of their designated system within the last six months, and there had been only one permanent transfer within the systems. *Id.* at 5. Though urgent care providers interact with providers from other clinics within their own system, they have virtually no contact with employees in the other systems. *Id.* at 4. Each system uses different electronic medical records systems, and employees cannot switch between systems without special training. *Id.* at 5.

All of MultiCare's urgent care facilities are managed by the Employer's retail health division. *Id.* Administrative issues for the Indigo and IC clinics are managed by MultiCare's executive director, while clinical practice for both systems is managed by a pair of medical directors. *Id.*

Geographically, Indigo clinics are located as far north as Marysville, Washington and as far south as Olympia, Washington. *Id.* at 6. IC clinics are more tightly clustered around the greater Seattle area, though there are three IC clinics isolated by water on the Kitsap Peninsula. *Id.*

MultiCare has a history of bargaining in multifacility units consisting of the urgent care clinics within a single urgent care system. On March 20, 2017, MultiCare and UAPD stipulated to two multifacility bargaining units. *Id.* at 6. One unit consisted of all urgent care clinics in the Indigo urgent care system; the second consisted of all urgent care clinics in the MUCC urgent care system. *Id*. In April 2017, representation elections were conducted in both units; UAPD won the election in the MUCC system but did not prevail in the election for the Indigo unit, leading to the new unit certification and election at issue here. *Id.*

Region 19 held a hearing on June 6, 2018. *See* Official Report of Proceedings Before the National Labor Relations Board Region 19. Nearly a week later, on June 11, 2018, MultiCare sought permission to supplement the record and introduce emails from their own witness dated February 2018, offering no evidence or argument as to why the emails were not introduced during the hearing on June 6. *See* MultiCare Health System's Motion to Supplement the Record Or In the Alternative Reopen The Hearing. In addition, the emails' author, Kirsten Saint Clair, had participated in the June 6 hearing as a witness. Official Report of Proceedings Before the National Labor Relations Board Region 19, 21:9. On June 12, the Regional Director denied MultiCare's motion to supplement the record on the grounds that the motion did not introduce newly discovered evidence or evidence which should have been taken at the hearing. *See* Order Denying Motion to Supplement the Record Or In the Alternative Reopen the Hearing.

The unit voted in a mail ballot election in July 2018. The ballots were counted on July 30; of 49 eligible voters, 26 cast ballots for the Union and 15 voted against representation. *See* NLRB Tally of Ballots.

MultiCare requested review of the Regional Director's certification of the Indigo unit on July 26, 2018, arguing that there was no meaningful distinction between the Indigo and the IC brand, that the Regional Director had improperly weighed the six factors used to assess unit appropriateness, and that the two systems were functionally integrated because they may be merged sometime in the future. On August 6, MultiCare filed three objections to the election, reiterating its argument that the Regional Director improperly approved the Indigo unit and adding objections alleging that he had improperly denied MultiCare's request for a hearing to present additional evidence and that the Union negotiated in bad faith on behalf of the MUCC unit in an attempt to persuade Indigo voters to vote for representation. Supplemental Decision and Certification of Representative, 1. On August 16, the Regional Director overruled each objection in a Supplemental Decision and Certification of Representative. *Id.* MultiCare now requests Board review of the Regional Director's supplemental decision, and UAPD files this response in opposition to MultiCare's request.

III. ARGUMENT

There Is No basis To Grant Review Because The Regional Director Properly Applied Board Precedent In His Decision Regarding The Appropriateness Of The Unit And MultiCare's Objections.

A request for review will be granted only for "compelling reasons." 29 CFR 102.67(d). There is no basis to grant review unless the Regional Director departed from precedent, a factual ruling was clearly erroneous and prejudiced the rights of a party, the conduct of the hearing resulted in prejudicial error, or there are compelling reasons for reconsideration of an important

Board rule or policy. 29 CFR §102.67(d)(1)-(4). There is no basis to grant review in this case. As is explained below, the Regional Director properly applied Board precedent in two thorough and well-reasoned decisions. The decisions do not contain clearly erroneous factual rulings, and there was no prejudicial error in the conduct of the hearing. Nor are there any compelling reasons to reconsider Board rules or policy. Accordingly, there is no basis to grant review in this case.

1. The Regional Director Properly Concluded That The Petitioned-For Bargaining Unit Is Appropriate.

In his Decision and Direction of Election, the Regional Director properly applied the traditional community of interest factors. Decision and Direction of Election ("Decision") at 6-7. The Regional Director correctly applied the Board's six-factor test to determine the appropriateness of a multi-facility unit, finding that the Indigo unit was appropriate based on analysis of the following factors: the unit employees' skills, duties, and working conditions; the functional integration of the Indigo and Immediate clinic systems; employee interchange between the Indigo and Immediate Clinic systems; centralized control of management and supervision; the geographic proximity of clinics; and bargaining history. *Id.* at 7. While the Regional Director found that certain factors weighed in favor of the larger unit urged by MultiCare, he correctly concluded that the petitioned-for unit was an appropriate one based on the lack of employee interchange and functional integration and the Employer's history of bargaining in units similar to the petitioned-for unit. *Id.* at 8-11.

The Regional Director correctly found that the Indigo and Immediate Clinic systems are not functionally integrated. *Id.* at 9. The Employer's urgent care clinic systems operate separately, each with its own dedicated pool of providers who work exclusively within that system. *Id.* As the Regional Director explained, "the clinics, within both the Indigo and IC

systems, operate separately, producing the same 'product' (healthcare) separately." *Id.* MultiCare's contention that the Regional Director departed from precedent by not giving adequate consideration to changes that were in progress at the time of the hearing is unavailing. The cases cited in MultiCare's Request for Review involved concrete changes that were in progress at the time of the hearing. *See Sleepy's Inc.*, 355 NLRB at 135 (employer planned to open an additional 10 stores between the hearing date and the end of the year); *Lab. Corp. of Am. Holdings*, 341 NLRB 1079, 1082 (2004) (documentary evidence established that "a new phlebotomist supervisor will be hired shortly"); *Clarian,* 344 NLRB at 344 (a "central medical laboratory is being built"). In this case, the Regional Director did not find that changes were in progress at the time of the hearing that would cause the Indigo and Immediate Clinic systems to be integrated. Rather, the Regional Director found that an Employer's witness testified that MultiCare "someday hoped" to integrate the two systems but "did not describe any specific plans for such an overhaul." Decision at 4. Accordingly, the cases cited in MultiCare's Request for Review are inapposite and do not show a departure from Board precedent.

The Regional Director correctly found that employee interchange weighed in favor of the appropriateness of the petitioned-for unit. As the Regional Director explained, "there is regular temporary interchange among Indigo clinics, but, with the exception of four providers identified as clocking time at both systems in the last 6 months, not between Indigo and IC. There is evidence of only a single instance of permanent interchange between the systems." Decision at 10. The Regional Director did not depart from precedent in finding that employee interchange "is a critical factor in determining whether employees who work in different groups or facilities share a sufficient community of interest to justify their inclusion in a single bargaining unit." *Id.* at 9. This principle is well established. *See, e.g., Executive Resource Assoc.*, 301 NLRB 400,

401(1991) (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)). MultiCare's reliance on *Exemplar, Inc.*, 363 NLRB No. 157 (2016) is unavailing. That case did not overturn Board precedent holding that employee interchange is a critical factor that is given substantial weight in the community of interest analysis. Rather, the Board in *Exemplar* simply found that on the facts of that case the Regional Director relied too heavily on the single factor of employee interchange where the other community of interest factors weighed in the other direction. *Id.* at *7. By contrast, in this case the Regional Director did not rely exclusively on the interchange factor. Rather, the Regional Director appropriately found that several factors weighed in favor of his conclusion that the petitioned-for unit was appropriate. Thus, *Exemplar* does not establish that the Regional Director departed from precedent in his Decision.

Finally, the Regional Director correctly found that bargaining history weighed in favor of the appropriateness of the petitioned-for unit. While MultiCare notes that the Board is not *bound* by bargaining history resulting from a stipulated election agreement rather than a Board certification, this does not mean that the history of bargaining "bears no relevance whatsoever" and that the Regional Director departed from Board precedent by even considering it. As the Board explained in *The Grand Union Company*, 176 NLRB 230 (1969), where the bargaining history was established by stipulated election agreements rather than Board determinations the Board found that "there has been some history of collective bargaining which we do not deem controlling". The Board noted that "this bargaining history might indicate the possible appropriateness of a broader geographic unit" but "it would not preclude a finding that a unit limited to the Waterbury store might also be appropriate." *Id.* at 231. In this case, the Regional Director applied the bargaining history factor in a manner that is consistent with Board precedent. The Regional Director correctly found that "there is a history of bargaining in a very

similar unit to the petitioned-for one." Decision at 11. He correctly noted that the Employer's ongoing bargaining with the MUCC unit demonstrates that "certifying a unit encompassing employees in another single urgent care system would not thereby create fractured units, and the existence of a unit encompassing one of the Employer's urgent care systems suggests that a unit encompassing another system is not inappropriate or unwieldy." *Id.* The Regional Director did not conclude that he was bound by the history of bargaining in this case. Rather, he appropriately found that "the weight given to a prior history of collective bargaining is 'substantial' but not 'conclusive.'" Decision at 11, citing *Turner Indus. Grp., LLC*, 349 NLRB 428, 430-31 (2007). He further noted, "The Board has found an employer's history of bargaining in similar units of employees weighs in favor of finding a unit to be appropriate." *Spartan Dep't Stores*, 140 NLRB 608, 610 (1963). There was no departure from precedent.

Applying the standards prescribed in 29 CFR §102.67(d), the Board should not consider MultiCare's request for review of the Regional Director's certification of the Indigo unit. No absence or departure from Board precedent occurred, nor were there any clear and prejudicial error, conduct resulting in prejudicial errors, or compelling reasons given for reconsideration of the Board's policies evaluating unit scope. Further, the appropriateness of the unit is not a valid basis for filing an objection to the conduct of an election. Accordingly, review of the Regional Director's decision regarding the scope of the Indigo unit would be inappropriate.

2. The Regional Director Properly Denied MultiCare's Request For A Hearing To Consider Additional Evidence Regarding Certification.

Similarly, the Regional Director's denial of MultiCare's request for a hearing to consider additional evidence was appropriate, and the Board should not consider the Employer's request for review of the decision.

In an attempt to revive their argument as to the scope of the Indigo unit, MultiCare also objects to the Regional Director's denial of their request for a hearing to review further evidence regarding purported functional integration of the Indigo and IC urgent care systems. The Employer alleges that the Regional Director erred in denying an additional hearing to review emails dated February 2018 and authored by one of their own witnesses from the Notice of Representation Hearing held in June 2018. The Regional Director denied MultiCare's request, finding that evidence of functional integration goes to unit scope, an inappropriate basis for a post-election objection.

The Regional Director was correct to deny MultiCare's request to reopen the record and present additional evidence at a hearing. The Employer's request to reopen the record came under 29 CFR §102.65(E)(1), which permits reopening of the record for newly discovered evidence or evidence which should have been taken at the hearing. The Regional Director properly found that neither justification is appropriate here. The evidence proffered—emails authored by one of their witnesses—was not newly discovered, nor was it prevented from being admitted due to an erroneous objection ruling. Rather, MultiCare did not present the emails as evidence at all, despite the emails' author's participation as a witness in the hearing. As such, no hearing was called for under 29 C.F.R. §102.65(E)(1), as there was no newly discovered or improperly excluded evidence proffered.

Accordingly, the Regional Director's decision did not depart from Board precedent, prejudice the rights of a party via clear error, or lead to a prejudicial error, and there is no compelling reason for reconsideration of the application of the Board's rules regarding reopening the record or timely objections to election conduct. As such, review of the Regional Director's decision as to the admission of additional evidence would be inappropriate.

3. The Regional Director Properly Overruled Multicare's Objection To The Union's Conduct In The MUCC Bargaining, As It Was Too Attenuated To The Indigo Unit's Vote And Did Not Allege Objectionable Conduct.

Finally, the Regional Director properly overruled MultiCare's objection to the Union's conduct with regard to reaching a collective bargaining agreement covering the MUCC unit. The Board should deny the Employer's request for reconsideration of its objection.

In its August 6 Objection to Election, MultiCare alleges that UAPD negotiated in bad faith on behalf of the unit representing MUCC providers in an attempt to persuade Indigo providers to vote in favor of representation. More specifically, the Employer argues that UAPD purposefully weakened its bargaining stance and reached a tentative agreement with MultiCare that it knew the MUCC unit would not ratify. MultiCare contends that UAPD sabotaged the MUCC unit's negotiation to convince Indigo voters the Union "would be able to quickly negotiate a collective bargaining agreement for them." Employer's Objection to Election, 2:9:10.

The Regional Director overruled this objection for three reasons. First, the Regional Director found the proffer lacked the specificity required to support an objection to bargaining conduct; it failed to explain how the MUCC unit's lack of ratification would incentivize the Indigo unit to vote for representation, how the Indigo unit would have found out about the alleged conduct, or how the assertions would have constituted objectionable conduct. Second, applying *In re Virginia Concrete Corp.*, the Regional Director found MultiCare's objection could not be heard because the gravamen of the objection was an unfair labor practice, "and sustaining the objection would require a finding that the alleged objectionable conduct violated the Act." 338 NLRB 1182, 1185 (2003). Third, the Regional Director found it perhaps most important that MultiCare's assertions were too attenuated to the actual Indigo recognition vote. Notably, MultiCare was unable to produce any precedent in which a Union's actions with respect to one

bargaining unit were found to have unlawfully affected the results of an election in a different bargaining unit.

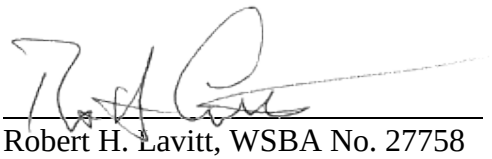
In addition, MultiCare's allegation regarding bad faith bargaining on behalf of the MUCC unit does not allege conduct that, if true, could be grounds for setting aside the election. The Board has held that "[e]employees are generally able to understand that a Union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining." *Smith Co.*, 192 NLRB 1098, 1101 (1971). It is not, however, unlawful or objectionable for a Union to promise employees increases in benefits to induce support for the Union, in recognition of the fact that the Employer – not the union – generally has control over such matters. *NLRB v. Kinter Brothers*, 419 F.2d 329, 335 (D.C. Cir. 1969). Even if the Union had intended to promise Indigo voters it would be able to quickly negotiate a collective bargaining agreement on its behalf, that promise would not have been for a benefit that is within the Union's control. Because the Union does not control the speed with which the parties would reach an agreement on a contract for the Indigo unit, it would not be objectionable conduct that would warrant setting aside an election.

The Regional Director's reasoning regarding MultiCare's third objection did not depart from Board precedent, prejudice the rights of a party via clear error, or lead to any prejudicial error, nor did MultiCare offer any compelling reason for reconsideration of the Board's rules or policies. In fact, the Regional Director relied on Board precedent to reach the conclusion that MultiCare's objection did not allege any objectionable conduct, and MultiCare failed to produce any contradictory Board rules or precedents to support their objection. Accordingly, review of the Regional Director's decision as to MultiCare's third objection would be inappropriate.

CONCLUSION

The Board should deny MultiCare's request for review of the Regional Director's decision to certify the Indigo unit and overrule MultiCare's objections to both the denial of its request to admit additional evidence and the Union's conduct in negotiations on behalf of a separate bargaining unit. Each of the Regional Director's decisions was proper, and none departed from Board precedent, prejudiced the rights of a party via clear error, or led to any prejudicial error, nor did MultiCare offer any compelling reason for reconsideration of the Board's rules or policies regarding each objection. Accordingly, review would be inappropriate under 28 C.F.R. §102.67(d)(1)-(4) and should be denied.

RESPECTFULLY SUBMITTED this 6th day of September, 2018.



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DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the United States that on September 6, 2018, I caused the foregoing Statement In Opposition To Employer's Request For Review Of Regional Director's Supplemental Decision And Certification Of Representative to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same to be delivered via email to:

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Signed in Seattle, Washington this 6th day of September, 2018.

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